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CASE NUMBER: 91-795

THE SUPREME COURT OF THE UNITED STATES

April 1992

ALLIED-SIGNAL, INC. V.
DIR., DIVISION OF TAXATION

On Writ of Certiorari from
the Supreme Court of New Jersey

BRIEF OF AMICUS CURIAE GEORGIA COALITION OF MILITARY/ FEDERAL RETIREES, INC.

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INTEREST OF AMICUS CURIAE

The Georgia Coalition of Military/Federal Retirees, Inc. is a statewide organization in Georgia that represents military and civil service retirees of the United States. The Coalition has sponsored three lawsuits in Georgia, encompassing 2700 retirees, seeking refunds from the State of Georgia for illegally collected taxes under the authority of Davis v. Michigan Dept. of Treasury, 489 U.S. 803, 109 S.Ct. 1500 (1989). To this point, Georgia has rejected refunds on the basis that Davis does not apply retroactively under the analysis employed in Chevron Oil v. Huson, 404 U.S. 97, 92 S.Ct. 349 (1971). Reich v. Collins, Clayton County Superior Court, Civil Action No. 90CV-18383-4, Order of December 11, 1991. Oral argument in the

Reich case is scheduled in the Georgia Supreme Court on Tuesday, April 14. Whatever decision is issued by the Georgia Supreme Court, a Petition for Certiorari to this Court will be filed.

The issue of retroactivity raised in Part 2 of this Court's Order of March 11, 1992 is at the heart of the dispute between the parties in the Georgia case.

QUESTION PRESENTED

Should retroactive relief be denied the taxpayer in the event this Court overrules Asarco v. Idaho State Tax Commissioner, 458 U.S. 307 (1982) and F.W. Woolworth Co. v. Taxation and Revenue Department, 458 U.S. 354 (1982).

ARGUMENT SUMMARY

Retroactive relief should be denied, but the Court should reformulate the test for prospective only relief by characterizing the test as one of remedies and limiting the test to cases that clearly break with established authorities.

ARGUMENT AND CITATION OF AUTHORITY

This Court Should Adopt a Rule of Retroactivity that is Based on the Law of Remedies and Limited to Cases that Break with Clearly Established Precedence.

The rule of retroactivity of Chevron Oil v. Huson, 404 U.S. 97, 92 S.Ct. 349 (1971), as applied in American Trucking Associations, Inc. v. Smith, ___ U.S. ___, 110 S.Ct. 2323 (1990) does not work. It absolutely abrogates the obligation of the states to protect the constitutional rights of its citizens in taxing matters. The practical effect of Chevron is that, in tax refund cases, state courts have denied retroactive relief by the score of 31-6. (Exhibits A and B). Of the cases where refunds have been granted, half of those involve local governments. (Exhibit B).

Thus, the impact of Chevron to the states is that the states need not be concerned about the constitutionality of

taxing provisions. If a taxing provision is found unconstitutional, it will invariably be applied prospectively only.

The Coalition respectfully submits that this is exactly the opposite from what the incentive for states should be. States should be compelled to scrupulously protect the constitutional rights of their citizens, especially in the critical area of taxing. Special interests create powerful political incentives for discriminatory taxing. Additionally, for a lone taxpayer, the discriminatory tax may be too small to merit the time and expense of litigation. Indeed, in Davis, it took a pro se plaintiff to finally challenge a widespread practice that was clearly illegal.

This problem is compounded by the Tax Injunction Act (28 U.S.C. § 1341) which bars taxpayers from federal court if

procedural avenues are available in state courts. This problem is also aggravated by state laws that do not permit class actions against the state. See, Waldron v. Collins, 758 F.2d 736 (11th Cir. 1986).

In areas where a state is uncertain about the constitutionality of a particular tax, the state should be strongly discouraged from implementing the tax. If the law is indeed unclear, the state has the opportunity to obtain declaratory relief or obtain a determination via a test case. The state can also seek revenues in the expansively broad area of established, constitutionally permitted taxation.

The Coalition concedes that there may be abrupt shifts in the law and that there are certain reliance interests of the State. The Coalition proposes a two part test that will balance these competing

interests. First, the Court should regard the issue of retroactivity as a question of remedies. Professors Fallon and Meltzer set forth a thorough and balanced discussion of this issue in 104 Harvard L. Rev. 1731 (1990). The Coalition cannot improve on this discussion except to summarize the point that, in a practical sense, the issue of retroactivity is ultimately one of whether relief will be granted or not.

Additionally, by treating retroactivity as a question of remedies, the Court permits the states to go beyond federal limitations in providing remedies to their citizens. See, American Trucking Associations, Inc. v. Smith, 110 S.Ct. at 2348, Stevens, J., dissenting. As this Court has held, principals of comity allow deference to state courts in matters of remedy.

Treating retroactivity as a question of remedies still allows this Court to require retroactive relief to protect federal interests. The Court can hold, as it does implicitly in most cases, that "newness" is not an issue, and retroactivity is required. The Court can also require retroactive relief as an issue of federal remedies. Varying federal interests will result in different applications of federal remedies. In other words, when retroactivity is treated as a remedy, a claimant seeking relief for deprivation of constitutional rights has the opportunity to obtain that relief under both state and federal law.

Without more, this approach might still produce no different results than Chevron, and could thus be subject to the criticism that it encourages judicial lawmaking. The Coalition's response to

this criticism is that the current standard of determining whether a decision is "new" is too loose. It is this "clearly foreshadowed" standard adopted in Chevron and never overruled that encourages outright judicial lawmaking. In the absence of a directly controlling case, almost any decision can be characterized as not clearly foreshadowed.

On this point, the Coalition parts from the conclusion in the analysis of Professors Fallon and Meltzer. To protect stare decisis and recognizing the extraordinarily limited nature prospective only applications should have, the Coalition proposes that the standard be adjusted to the "clear break" standard suggested in American Trucking, 110 S.Ct. at 2334. Unless a case clearly deviates from an established precedent, it cannot be regarded as "new," and the case must be

applied retroactively under federal law.

Thus, the proposal of the Coalition would require the Court to first look at whether a decision clearly broke with established authorities. If not, retroactive relief must be available. If there is a clear break, then federal law of remedies applies, and retroactive relief will be available if state or federal law provides it, subject to Due Process requirements. McKesson Corp. v. Florida Alcohol & Tobacco Div., 496 U.S. 18, 110 S.Ct. 2238 (1990). Consistent with Due Process, states can impose procedural limitations.

In the instant case, this Court's decision would clearly break with established precedent but there are no compelling federal interest requiring retroactive relief. Thus, the case should be remanded to the state courts for a

determination of whether state law requires retroactive relief.

Respectfully submitted,

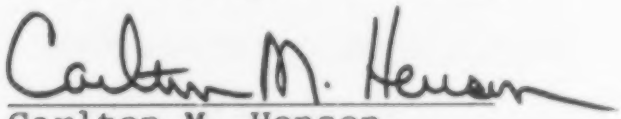

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EXHIBIT A
FULL RETROACTIVE RELIEF DENIED

The cases in these two exhibits were obtained using a Westlaw Quick Cite search of the State Tax Cases database (MTX-CS) using the following query: "(Chevron +3 Oil /s Huson) '404 U.S. 97' '92 S.Ct. 349' & Retroactiv!". Cases that did not address or decide retroactivity were omitted.

Bass v. State, ___ S.E.2d ___, 1992 WL 13852 (S.C. 1992).

Duffy v. Wetzler, ___ N.Y.S.2d ___, 1992 WL 6962 (N.Y.App.Div. 1992).

Sheehy v. State, 820 P.2d 1257 (Mont. 1991).

Harper v. Virginia Dept. of Taxation, 242 Va. 322, 410 S.E.2d 629 (1991).

First Nat. Bank of Eden v. Meyer, 476 N.W.2d 267 (S.D. 1991).

Yount v. Calvert, 1991 WL 176345 (Ky. App. 1991).

American Trucking Associations, Inc. v. McNulty, 596 A.2d 784 (Pa. 1991).

Swanson v. State, 329 N.C. 576, 407 S.E.2d 791 (1991).

Harper v. Virginia Dept. of Taxation, 241 Va. 232, 401 S.E.2d 868 (1991).

Caterpillar, Inc. v. Department of Treasury, 470 N.W.2d 80 (Mich. App. 1991).

Ragsdale v. Department of Revenue, 1990 WL 174474, 11 Or. Tax 440 (1990).

Bass v. State, 302 S.C. 250, 395 S.E.2d 171 (1990).

Cambridge State Bank v. Roemer, 457 N.W.2d 716 (Minn. 1990).

Private Truck Council of America, Inc. v. Oklahoma Tax Comm'n, 806 P.2d 598 (Okla. 1990).

White v. Reynolds Metals Co., 558 So.2d 367 (Ala. Civ. App. 1990).

James B. Beam Distilling Co. v. State, 259 Ga. 363, 382 S.E.2d 95 (1989).

Dennehy v. Department of Revenue, 1989 WL 9252, 11 Or. Tax 191 (1989).

American Trucking Associations, Inc. v. Gray, 295 Ark. 43, 746 S.W.2d 377 (1988).

National Can Corp. v. State, Dept. of Revenue, 109 Wash.2d 878, 749 P.2d 1286 (1988).

Exxon Corp. v. Hunt, 109 N.J. 110, 534 A.2d 1 (1987).

Ashland Oil, Inc. v. Rose, 177 W.Va. 20, 350 S.E.2d 531 (1986).

Federated Mut. Ins. Co. v. DeKalb County, 255 Ga. 522, 341 S.E.2d 3 (1986).

First of McAlester Corp. v. Oklahoma Tax Com'n, 709 P.2d 1026 (Okla. 1985).

Riehm v. Director, Div. of Taxation, 7 N.J. Tax 88 (1984).

Board of Comm'rs of Wood Dale Public Library Dist. v. Du Page County, 103 Ill. 2d 422, 469 N.E.2d 1370 (1984).

Salorio v. Glaser, 93 N.J. 447, 461 A.2d 1100 (1983).

Midway Tobacco Co. v. Mahin, 42 Ill. App. 2d 797, 356 N.E.2d 909 (1976).

EXHIBIT B
FULL RETROACTIVE RELIEF GRANTED

Service Oil, Inc. v. State, 479 N.W.2d 815 (N.D. 1992).

Kay Elec. Co-op. v. State ex rel. Oklahoma Tax Comm'n, 815 P.2d 175 (Okla. 1991).

Allis-Chalmers Corp. v. City of North Bonneville, 113 Wash.2d 108, 775 P.2d 953 (1989).

Ryan v. City of Chicago, 148 Ill. App. 3d 638, 499 N.E.2d 517 (1986).

LaRoque v. State, 178 Mont. 315, 583 P.2d 1059 (1978).

Ralston Purina Co v. Los Angeles County, 56 Cal. App. 3d 547, 128 Cal. Rptr. 556 91976).